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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ANDREW JONES, Defendant and Appellant.	B227030 (Los Angeles County Super. Ct. No. BA313609)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael E. Pastor, Judge. Affirmed.

Sharon Fleming, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven E. Mercer and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Andrew Jones appeals from the judgment entered following a jury trial in which he was convicted of second degree murder and mayhem, with findings he used a dangerous and deadly weapon. Defendant contends the trial court committed several instructional errors and erred by ordering him to submit to a clinical interview by the prosecution's mental health expert. We affirm.

BACKGROUND

In the early morning hours of December 4, 2006, Rodney Wyatt was killed in a parking lot across Flower Street from Staples Center. (Undesignated dates pertain to December 4, 2006.) The deputy medical examiner testified that Wyatt was six feet tall and weighed just 138 pounds. He suffered more than 30 wounds to his head and neck, mostly "sharp force" wounds that could have been inflicted with broken glass. The majority of the sharp force wounds were on the right side of Wyatt's face and neck. Wyatt's right ear was partially severed. He had a circular pattern of cuts to his neck that were consistent with a broken bottle being thrust into his neck. There was also a shallow slash all the way across Wyatt's throat. Many of the incised wounds—including the partial severing of the ear and the circular cuts to the neck—had a back to front trajectory, suggesting they were probably not sustained in a face-to-face confrontation. Wyatt also sustained blunt force head trauma consistent with someone stomping on the right side of his head, forcing the left side of his head against the pavement. He had multiple head fractures, including the bridge of his nose, his jaw, and hard palate. Two teeth were broken off and he had swallowed one of them. Blood had pooled in his left lung, indicating that he had been lying on his left side. Wyatt's neck had also been compressed. The deputy medical examiner testified Wyatt died from blunt and sharp force trauma to his head an neck, but she opined that the blunt force injuries were more likely the cause of his death. Wyatt had no defensive wounds and no wounds on his torso.

Delmer Totten lived in a loft on Flower Street two buildings down from the parking lot where Wyatt died. Totten's friends James Garstka and Ashley Likins visited

Totten the night of the charged crimes, and Likins parked her Nissan Xterra in the same parking lot, next to a green Toyota 4Runner. Likins testified that she and Garstka arrived around midnight. A little after 1:00 a.m., Totten went outside to empty his trash and check on Likins's car. He saw Wyatt lying on his side on a flattened cardboard box. Wyatt was dirty, unkempt, and had no shoes or blankets. He appeared to be emaciated, confused, and tired. Totten was concerned and asked Wyatt how he was and where his shoes were. Wyatt did not remember and requested a battery and piece of copper wire. Totten went back to his loft, gathered a pair of shoes, a blanket, a small package of Nutter Butter cookies, and a book of matches, then returned to the parking lot and handed these items to Wyatt, who was still lying on his side. Wyatt placed them on the ground in front of him. Defendant walked up and stood about two feet from Totten and three feet from Wyatt. Defendant repeatedly yelled that a woman had taken $40,000 and two ounces of cocaine from him. He was extremely agitated and aggressive and his speech was slightly slurred. Totten thought defendant appeared to be intoxicated and homeless. Totten asked defendant to calm down and keep his voice down. Wyatt asked defendant to go away and leave them alone. Defendant responded by yelling angrily and aggressively at Wyatt, "Don't tell me what to do. I'll kick your ass. Fuck you." Defendant pulled crack pipes and what appeared to be rock cocaine from his pockets and put them on the hood of one of the cars. Totten feared there would be a physical confrontation. Totten told defendant to calm down, but defendant largely ignored him and continued threatening Wyatt. After about 10 to 13 minutes, a security guard from a neighboring building walked into the lot, and Totten felt it was safe to leave.

Garstka and Likins testified that Totten was visibly upset when he returned to the loft. He told them an irate man threw money and drugs on the hood of a car and was screaming about someone owing him money. Garstka and Likins left Totten's loft around 2:00 a.m. Ten to 30 minutes before they left, they heard loud talking or screaming and a loud bang like someone hitting a car with a fist. Likins told a detective that she heard two men arguing loudly, then a bang.

As Garstka and Likins reached the parking lot, they saw defendant pacing between Likins's car and the 4Runner while talking to himself. Garstka saw blood on the ground between the two vehicles. Defendant repeatedly swept his hand along the passenger side of Likins's car. Garstka testified defendant was talking loudly, angrily, and nonsensically, while Likins told the police that she heard defendant say, "I told him he shouldn't have." Likins and defendant looked at one another and froze. She testified "it looked like he was trying to figure out something," but thought he might hurt her. Garstka saw Wyatt's "lifeless body" lying in the pool of blood. Likins and Garstka both got into the car through the driver's door. From the passenger-side window Likins saw Wyatt lying on his back between her car and the 4Runner, covered with so much blood she could not determine his skin color. Defendant walked toward the driver's door of Likins's car as Garstka started the engine. Defendant was looking into the car and speaking. He seemed frustrated. As Garstka drove away, he and Likins saw defendant walk up to Wyatt, lift his leg high, and stomp his foot straight down on Wyatt's head with great force.

Likins phoned 911 as they drove away and reported observing a fight, but she and Garstka testified at trial that Wyatt was lying on the ground motionless the entire time they were observing him. Likins also told the 911 dispatcher that defendant appeared to be crazed or high on crack.

A defense investigator who spoke to Likins in July of 2010 testified that Likens said defendant appeared to be under the influence of drugs and seemed as if he were trying to figure out where he was and if she and Garstka were real. Garstka told the same investigator that defendant seemed not to know what was going on and was looking at them as if trying to figure out if they were there.

Los Angeles Police Department Officers Alberto Vasquez and Antonio Ramirez went to the parking lot in response to Likins's 911 call. They saw defendant walking toward them and the 4Runner in a normal fashion. The officers called out to defendant and identified themselves as police officers. Defendant made eye contact with them,

turned around, and walked, then ran, toward the alley. The officers saw Wyatt lying on the ground next to the 4Runner, covered in blood. They chased defendant down the alley, across Pico, through a parking lot, and down a second alley. Defendant ran fast and never stumbled or fell. Vasquez saw defendant extract something from his right pocket and toss it to the left as he ran. Defendant hid behind a dumpster in the second alley. Vasquez was the first officer to reach the dumpster. He aimed his gun at defendant and commanded him to stand up, turn around, and put his hands in the air. Defendant seemed calm, but did not comply. Five other officers arrived and surrounded the dumpster. Defendant continued to defy them. Officer Joseph Marx testified that defendant repeatedly responded, "No" to the officers' commands. After Marx asked another officer to get a Taser, defendant said, "Okay, I give up." Defendant then obeyed the officers' commands and was handcuffed without further incident.

Officers Vasquez, Marx, and Kathleen Owens-Shaw testified that defendant did not appear to be under the influence, his speech was not slurred, he was not staggering or talking to himself, and he was quiet and cooperative after surrendering. Officer Donald Casper testified that he thought defendant "may have been" under the influence of drugs or alcohol, but did not explain his opinion. Casper agreed that defendant's speech was not slurred, he was not staggering, mumbling, talking to himself, or acting irrationally, and he was calm and cooperative. Casper did not perform any sobriety or drug tests on defendant and testified he did not recall whether he smelled alcohol on defendant.

Marx searched defendant and in defendant's pocket found three folded, bloody dollar bills and a cocaine pipe that appeared to contain cocaine residue. Defendant had a scraped knee and his left hand was bleeding from cuts on the fingers, a cut between the thumb and first finger, and a wound on his palm from which the skin was missing. His hands, arms, shoes, socks, and clothing were covered in blood. The officers summoned paramedics, who bandaged defendant's left hand. Defendant was calm and cooperated with the paramedics.

At the scene, defendant made three spontaneous statements. He first said, "You better check on that drug fiend." He then said, "Nigger ought to be dead. I gave him two dollars and that nigger tried to rob me." A little later defendant said, "I hope he's going to be okay." The officers put defendant in their squad car and kept him there for about 45 minutes before driving him to the police station. He was quiet and calm the entire time.

At the police station, Marx, Casper, and Detective Douglas Pierce took 30 to 40 digital photographs of defendant wearing, then removing, his bloody clothing. These photographs were introduced at trial. Defendant cooperated with the officers' instructions and was neither talking to himself nor falling down.

Vasquez and Ramirez found a bloody, unopened package of Nutter Butter cookies in the alley where Vasquez saw defendant discard something. Detectives Pierce and John Thacker arrived at the parking lot after Wyatt had been transported to a hospital. Thacker and Pierce found a trail of bloody footprints leading from the 4Runner, across the parking lot, and down the alley. They also found broken bottles and glass shards near some bloody clothing.

Sometime after 6:00 a.m., Likins and Garstka observed blood and what appeared to be flesh on the passenger side exterior of Likins's car. They notified the police and drove the car back to the parking lot for the police to examine. Pierce saw smeared blood and blood spatter on the car and removed a piece of skin from it. A partial profile of DNA developed from the skin was consistent with Wyatt.

Likins and Totten identified defendant's photograph in a photographic array. Totten wrote the following about defendant: "He was extremely agitated and appeared very intoxicated. He kept yelling at me and then would yell at the homeless man whom I just gave a pair of sneakers, green blanket, and pack of Nutter Butter cookies to."

The parties stipulated that Dr. J. Frazier examined defendant at the jail dispensary about 11:40 a.m. in the presence of Thacker and Pierce, and defendant stated that he used cocaine and alcohol, including 12 ounces of beer, the previous night. Thacker testified

that he heard defendant "further explain[]" "that it was 12 ounces of alcohol only and . . . very little cocaine." Defendant was calm and cooperative at the dispensary.

Pierce testified that his observations of, and interactions with defendant did not indicate intoxication. Defendant was cooperative, followed directions, and did not have an odor of alcohol. Defendant's behavior was "rational and straightforward." Thacker and Pierce discussed whether to ask the dispensary physician to take a sample of defendant's blood for alcohol and drug testing. Thacker ultimately decided not to do so, although he was aware that one officer had said defendant might have been under the influence. Thacker testified that he decided not to do so because he believed that defendant's behavior, as observed by a number of officers, demonstrated that defendant's thought processes were not impaired by alcohol or drugs. In particular, Thacker cited defendant's reaction when he saw the first officers arrive on the scene; his swift and sure-footed flight from the officers; his acts of discarding the cookies, hiding behind a dumpster, and refusing to surrender until surrounded by numerous officers; and his conduct after he was detained and at the police station. Thacker concluded that defendant's actions demonstrated "conscious, purposeful, deliberate action that requires some clear-headed, concise, lucid thinking." In addition, Thacker relied upon defendant's own statement to the doctor at the jail dispensary that he had consumed only 12 ounces of alcohol in the form of beer and very little cocaine the previous night.

Defendant testified that he had been to a psychiatric hospital four or five times since he moved to California 10 or 11 months before the charged offenses. He had stopped taking his prescribed psychiatric medicines. He was homeless and used crack cocaine and alcohol. In the days leading up the crimes he had been consuming a lot of both and had not slept for at least a day, perhaps more. He consumed additional crack cocaine and alcohol on the day of the crimes, including a pint of vodka, beer, and fortified wine. Voices in his head disparaged and chided him, but they did not tell him to kill. He bought food and fortified wine and walked to a parking lot across from Staples Center, where he sat down to rest.

Wyatt walked into the same parking lot. Defendant agreed that Wyatt looked tired, thin, frail, and weak. They initially got along. Defendant shared some crack cocaine and wine with Wyatt and offered him food. Wyatt asked defendant for money, and defendant gave him a few dollars. Wyatt left. Wyatt later returned "in a rage." He was aggressive and looked spaced out and crazy. He picked up the bottle of wine and asked defendant for some more crack cocaine. Defendant said he did not have any more. Wyatt repeatedly called defendant a liar and demanded cocaine. Wyatt grasped the neck of the wine bottle with both hands. Defendant stood up. Wyatt drew the bottle back as if to use it as a weapon and reached for defendant's pocket. Defendant swatted Wyatt's hand away and Wyatt swung the bottle at defendant. Defendant was afraid, but not angry. He grabbed at the bottle and it hit his shoulder. Defendant and Wyatt fought, then fell over a cement parking block onto the ground. After that "everything just went . . . foggy, dim." Defendant remembered picking up a bottle and swinging it and picking up a piece of glass and using it to hit Wyatt once. Defendant was defending himself and did not think about what he was doing. He did not remember stomping on Wyatt and did not remember seeing any of the witnesses in the parking lot.

The next thing defendant remembered was someone shining a light and yelling. He looked down and saw Wyatt lying in a pool of blood, became scared and paranoid, and ran. He was not trying to evade or hide from the police. Defendant felt very bad about killing Wyatt. He did not mean to do so and did not remember what he had done, but he denied stealing the Nutter Butter cookies.

Security guard Juan Cuillar testified that about 2:00 a.m. he heard and saw two African-American men arguing in the parking lot. One man, whom Cuillar identified as Wyatt, was standing and yelling at a calm man seated on the ground, whom Cuillar identified as defendant. Wyatt said that defendant had scratched his car. Cuillar thought that defendant appeared to be homeless, but not intoxicated. Wyatt did not appear to be homeless. Defendant told Cuillar that everything was fine, so Cuillar left and went inside one of the nearby buildings. Cuillar did not see anyone else in the parking lot.

The toxicologist from the coroner's office who tested Wyatt's blood testified for the defense that Wyatt had cocaine and metabolites of cocaine in his blood, indicating consumption of cocaine between two hours to 30 minutes before his death. He also had a trace amount of alcohol in his blood. The toxicologist thought Wyatt would have been under the influence of cocaine, which is a stimulant.

The jury convicted defendant of second degree murder and mayhem and found he used a deadly and dangerous weapon in the commission of each offense. The jury acquitted him of robbery and petty theft. The court sentenced defendant to prison for 16 years to life for the murder and weapon enhancement and stayed the sentence on the mayhem conviction pursuant to Penal Code section 654. (Undesignated statutory references are to the Penal Code.)

DISCUSSION

1. Order for compelled interview with prosecution mental health expert

About three months before defendant's trial began, the defense provided the prosecution with discovery regarding its anticipated mental state defense, including medical records for defendant and two letters to defense counsel from psychologist Dr. Ari Kalechstein. These letters stated that Kalechstein had "evaluated" defendant and reviewed the medical records defense counsel had provided and "the discovery that was included in the murder book." Kalechstein opined, "[I]t is my opinion that [defendant's] behavior at the time of the incident was consistent with that of a person who acted without thinking, i.e., acted without deliberating, acted without considering the consequences of his actions, acted without planning. Furthermore, at times during the incident, [defendant's] behavior was consistent with that of an individual who was unaware of his behavior and the context in which it occurred."

In response, the prosecutor sought an order compelling defendant to submit to a clinical interview by a prosecution-retained psychiatrist, Dr. Kory Knapke, under authority of section 1054.3, subdivision (b). Defendant vigorously opposed the prosecutor's request on a variety of grounds, including that it would violate his privilege

against self-incrimination and his rights to due process, counsel, and a fair trial. Defense counsel told the court that Kalechstein's testimony would be based solely upon statements of witnesses, defendant's medical records, and the information set forth in Kalechstein's unredacted report, not upon the results of his clinical interview or testing, and that counsel would provide the prosecutor with the unredacted report before Kalechstein testified, if she decided to call him as a witness. Counsel further represented that Kalechstein would opine as stated in his two letters; that defendant's behavior was consistent with someone suffering a blackout; that such a blackout could have been caused by defendant's consumption of alcohol and drugs, lack of sleep, mental illness, and trauma associated with experiencing Wyatt's death; and how alcohol and drug use can induce a blackout or amnesia. Defense counsel also suggested she could render section 1054.3, subdivision (b), inapplicable by having Kalechstein testify only about the causes of blackouts and how defendant's behavior was consistent with someone who had suffered a blackout.

The trial court considered the motion over the course of several pretrial hearings, and initially ruled that the motion was premature because defendant had not then placed his mental state in issue.

The court reconsidered its ruling during jury selection after noting that defense counsel had raised mental state issues such as intoxication and unconsciousness during voir dire. After hearing additional argument on the issue, during which defense counsel suggested that she could limit her direct examination of Kalechstein to hypothetical questions, the court concluded that defendant had not only placed his mental state in issue, it was the "foundation of the defense case." The court found that it would be inappropriate and unsatisfactory to limit the defense expert's testimony as defense counsel suggested in an attempt to avoid application of section 1054.3, subdivision (b). The court further found it would be unfair to the prosecution and Dr. Knapke to "wait until one particular point before the prosecution is allowed to even begin this whole process," given that Knapke would have to find time in his schedule, get access to

defendant, and "think and evaluate and prepare a report." The court ordered defendant to submit to an unrestricted clinical interview, without any psychological or psychiatric testing, by Knapke whenever Knapke could obtain access to defendant, but Knapke would be prohibited from disclosing anything pertaining to the interview to the prosecutor, defense counsel, the court or anyone else until the court determined that defendant had actually put his mental state in issue through Kalechstein's or his own testimony. The court denied defense counsel's requests to require that Knapke either tape record the interview or conduct it in the presence of defense counsel.

Several days later, defense counsel again asked the court to require Knapke to tape record the interview. Counsel argued that Knapke "is going to . . . conduct a detailed interview of [defendant] regarding the facts, underlying facts of this case which will result in possible impeachment evidence and will be used by the prosecutor to impeach my client should he testify or to impeach my expert. [¶] . . . [¶] . . . We should have an absolute clear record of what was said between Doctor Knapke and my client." The court again refused to require Knapke to record the interview or allow defense counsel to be present, but ruled that Knapke was free to do either or both.

About a week later, Knapke notified the court that defendant had declined to meet with him unless defense counsel were present and the interview was taped. Knapke did not want to conduct the interview in the presence of counsel and "there was some issue about the sheriff declining to have a tape recorder." Thus, the interview did not occur. Defense counsel informed the court that she had decided not to call Kalechstein, agreed this was "a strategic and tactical decision," and explained that she wanted to avoid having the court instruct the jury that defendant had refused to be interviewed by the prosecution's expert.

Defendant contends that (1) the trial court's order violated section 1054.3, subdivision (b) because the clinical interview ordered by the court did not bear a reasonable relationship to his mental state defense, given his offer to limit Kalechstein's testimony; (2) the order violated his privilege against self-incrimination and his rights to

due process, counsel, and a fair trial; and (3) the court abused its discretion by refusing to require either the presence of defense counsel or the tape recording of the interview.

Section 1054.3, subdivision (b)(1) provides as follows: "Unless otherwise specifically addressed by an existing provision of law, whenever a defendant in a criminal action or a minor in a juvenile proceeding brought pursuant to a petition alleging the juvenile to be within Section 602 of the Welfare and Institutions Code places in issue his or her mental state at any phase of the criminal action or juvenile proceeding through the proposed testimony of any mental health expert, upon timely request by the prosecution, the court may order that the defendant or juvenile submit to examination by a prosecution-retained mental health expert. [¶] (A) The prosecution shall bear the cost of any such mental health expert's fees for examination and testimony at a criminal trial or juvenile court proceeding. [¶] (B) The prosecuting attorney shall submit a list of tests proposed to be administered by the prosecution expert to the defendant in a criminal action or a minor in a juvenile proceeding. At the request of the defendant in a criminal action or a minor in a juvenile proceeding, a hearing shall be held to consider any objections raised to the proposed tests before any test is administered. Before ordering that the defendant submit to the examination, the trial court must make a threshold determination that the proposed tests bear some reasonable relation to the mental state placed in issue by the defendant in a criminal action or a minor in a juvenile proceeding. For the purposes of this subdivision, the term 'tests' shall include any and all assessment techniques such as a clinical interview or a mental status examination."

a. Application of statue

At the time the trial court ordered defendant to submit to a clinical interview with Knapke, defendant had made it clear that his defense would revolve around a theory that he lacked the requisite mental states for the charged offenses due to voluntary intoxication and mental illness. He had expressly informed the court and the prosecutor that he would introduce the testimony of Kalechstein, a psychologist, in support of the mental state defenses. Defendant was thus "plac[ing] in issue his . . . mental state . . .

through the *proposed* testimony of any mental health expert" and fell squarely within the statute, whether or not Kalechstein's ultimate testimony was based upon his interview with defendant or simply his expertise, without reference to anything he learned through his evaluation of defendant. The statute does not require that the "the proposed testimony of any mental health expert" be based upon an interview or testing in order for the court to order a defendant to "submit to examination by a prosecution-retained mental health expert." Similarly, the "threshold determination that the proposed tests bear some reasonable relation to the mental state placed in issue by the defendant" turns upon the mental state in issue, not the bases of the defense expert's testimony. Here, because Kalechstein had interviewed and evaluated defendant, and defendant intended to rely upon the theories set forth in Kalechstein's letter, that is, he acted without thinking and was "unaware of his behavior and the context in which it occurred" as a result of his mental illness and voluntary intoxication, a clinical interview was reasonably related to the mental state defendant planned to place in issue.

Defendant's reliance upon a distinction drawn in *People v. Gonzales* (2011) 51 Cal.4th 894 (*Gonzales*) is unavailing for two reasons. In *Gonzales*, the Supreme Court stated, "As the Attorney General points out, had the defense been content with evidence of battered woman syndrome in general, without presenting experts who had examined defendant, the prosecution would have had no ground for requesting an examination by its experts. But since the defense did present expert testimony based on interviews with defendant, the court properly found that fairness required giving the prosecution the opportunity to counter that testimony." (*Gonzales*, at pp. 928–929.) *Gonzales* addressed the propriety of an examination under authority of *People v. Danis* (1973) 31 Cal.App.3d 782 and Evidence Code section 730, not section 1054.3, subdivision (b), which was enacted while Gonzales's case was pending in the Supreme Court. (*Gonzales*, at pp. 925–927.) The application of section 1054.3, subdivision (b) is not limited to defendants who have placed their mental state in issue through the proposed testimony of a mental

health expert *who examined or interviewed defendant*. And unlike the situation posited in *Gonzales*, defendant's proposed expert had examined him.

b. Constitutional protections

"A criminal defendant who tenders his or her mental state as a guilt or penalty issue waives the Fifth Amendment privilege against self-incrimination, and the Sixth Amendment right to counsel, '"to the extent necessary to permit a proper examination of that condition."'" (*Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1116–1117 (*Maldonado*), quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 412.) In addition, "the Fifth Amendment does not provide a privilege against the compelled 'disclosure' of self-incriminating materials or information, but only precludes the use of such evidence in a criminal prosecution against the person from whom it was compelled." (*Maldonado*, at p. 1134.) Thus, the trial court's order that defendant submit to an examination by the prosecution's mental health expert did not violate the Fifth Amendment. Nor would the Fifth Amendment have been violated by defendant's act of answering the expert's questions or making statements to the expert in the course of the ordered examination, had he complied with the court's order. The Fifth Amendment would have come into play only if and when defendant's statements to the prosecution expert were used against him at trial, and only to the extent that he had not waived his privilege by tendering his mental state. Given the course of events in this case, there was no violation of the Fifth Amendment.

As previously noted, by placing his mental state in issue, defendant waived his Sixth Amendment right to counsel, "to the extent necessary to permit a proper examination." (*Maldonado, supra*, 53 Cal.4th at pp. 1116–1117.) In addition, the order to submit to the section 1054.3, subdivision (b) examination did not violate defendant's Sixth Amendment because, "As [the Supreme Court] long ago made clear, such examinations do not violate a represented defendant's right to counsel so long as counsel is notified in advance of examination appointments and their purpose, and has the

opportunity to consult with the client before they occur." (*Maldonado*, *supra*, 53 Cal.4th at p. 1142.)

Similarly, by placing his mental state in issue, defendant waived any due process right to object to examination by a prosecution expert. (*Gonzales*, *supra*, 51 Cal.4th at p. 929 & fn. 18.)

c. Tape recording and presence of counsel

Neither section 1054.3 nor any other authority required that a recording be made of the clinical interview by the prosecution's expert or that defense counsel be allowed to attend that interview. Defendant's asserted need for a recording of the interview was necessarily based upon an assumption that the statements he would make to Knapke about the "facts of the case" would be inconsistent with the testimony defendant would give at trial. Defendant thus could obviate the need for a recording simply by testifying truthfully and making truthful statements to Knapke, thereby avoiding any inconsistent statements. Counsel failed to explain how statements by defendant to Knapke could be used to impeach Kalechstein. The experts might well have reached different conclusions regarding defendant's mental state, but this would not be a matter of impeachment, and defendant failed to show why or how a recording would be necessary or even helpful in rebutting an opinion by Knapke that was unfavorable to the defense.

There is a substantial risk that if counsel were present, she would prevent defendant from answering questions she considered damaging to the defense or otherwise influence defendant's responses, thus preventing the expert from forming an accurate assessment of defendant's mental state. While counsel would naturally want to protect her client, her intervention would undermine the entire purpose the compelled interview, yet serve no valid purpose because defendant waived his Fifth Amendment privilege against self-incrimination, his Sixth Amendment right to counsel, and any due process claim "to the extent necessary to permit a proper examination." (*Maldonado*, *supra*, 53 Cal.4th at pp. 1116–1117.) Accordingly, the trial court did not act arbitrarily,

capriciously, or in a patently absurd manner by permitting, but not mandating, a recording and counsel's attendance.

2. Refusal to instruct on heat of passion

The trial court instructed the jury on first degree murder, second degree murder, voluntary manslaughter on an unreasonable self-defense theory, involuntary manslaughter based on unconsciousness resulting from voluntary intoxication, intoxication as negating a required mental state or specific intent, self-defense, and defense against a forcible and atrocious crime.

Defendant requested instruction upon heat of passion, but agreed with the trial court that it was inapplicable. Just before the court instructed the jury, defendant asked the court to instruct on heat of passion, saying, "[T]he facts presented, testified to by the witnesses including [defendant], show that he reacted to the provocation by the victim. The provocation being the victim going into his pocket or reaching for his pocket and swinging the wine bottle at him." The trial court denied defendant's request to instruct on heat of passion, noting that it was instructing on self-defense and unreasonable self-defense and did not "believe that the quantum and quality of evidence in this case is sufficient to justify heat of passion or provocation as a separate theory . . . ." Defendant contends this was error and violated due process.

"Where an intentional and unlawful killing occurs 'upon a sudden quarrel or heat of passion' (§ 192, subd. (a)), the malice aforethought required for murder is negated, and the offense is reduced to voluntary manslaughter—a lesser included offense of murder." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306 (*Carasi*).) Heat of passion has both objective and subjective components. (*People v. Moye* (2009) 47 Cal.4th 537, 549 (*Moye*).) To satisfy the objective component, the claimed provocation must be sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection, from passion rather than from judgment. (*Moye*, at p. 550; *Carasi*, at p. 1306.) "The provocation . . . must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim."

(*Moye*, at pp. 549–550.) A defendant may not "'"set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused. . . ."'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1215–1216, quoting *People v. Steele* (2002) 27 Cal.4th 1230, 1252.) "To satisfy the subjective element of this form of voluntary manslaughter, the accused must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation." (*Moye*, at p. 550.)

A trial court must give a requested instruction only if it is supported by substantial evidence, that is, evidence sufficient to deserve jury consideration. (*People v. Marshall* (1997) 15 Cal.4th 1, 39.) The court must instruct upon all theories of a lesser included offense that find substantial support in the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*).) The effect of an error in refusing to instruct on a lesser included offense is analyzed pursuant to *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Moye*, *supra*, 47 Cal.4th at p. 541.)

Here there was no evidence that defendant was subjectively under the influence of a strong passion aroused by a provocation when he killed Wyatt. Defendant testified that when Wyatt attempted to reach in his pocket and swung a bottle at him, he was afraid but not angry. Defendant remembered swinging a bottle and striking Wyatt once with a pieces of glass, but did not remember anything after that. The defense theory was that defendant was not conscious of his behavior from that moment forward. A blank memory is not equivalent to acting under the influence of a strong passion, and defendant does not explain how one can act under the influence of *anything* if unconscious. Defendant's testimony thus did not provide substantial evidence that he was actually under the influence of a strong passion when he repeatedly cut Wyatt's face and head, much less when he later stomped on Wyatt's head.

Nor did the testimony of any other witness provide substantial evidence supporting the subjective element of heat of passion. Totten's testimony supported an inference that defendant, not Wyatt, was the aggressor and source of any provocation. Likins and Garstka saw defendant stomp on Wyatt's head after Wyatt had been lying, immobile and

apparently unconscious, on the ground for at least as long as Likins and Garstka observed defendant pacing between Likins's car and the adjacent car while they approached Likins's car, got in, and drove away. Totten, Garstka, and Likins variously testified or told the police that defendant was intoxicated, crazy, under the influence of drugs, or profoundly confused, but not that he was acting under the influence of strong emotion. Finally, the statements by defendant to which Likins and several police officers testified fail to show that defendant was subjectively under the influence of a strong passion aroused by a provocation when he killed Wyatt. The statements tended to show defendant's motive and animosity toward, or concern for, Wyatt, but such mental states do not demonstrate the subjective element of heat of passion.

To the extent defendant argues that his fear induced by Wyatt's conduct supported instruction upon heat of passion, he is wrong. Although heat of passion may be based upon "any '"'[v]iolent, intense, high-wrought or enthusiastic emotion'"' [citation] other than revenge" (*Breverman*, *supra*, 19 Cal.4th at p. 163), a defendant's fear that supports instruction upon self-defense or unreasonable self-defense does not by itself support the subjective element of heat of passion. (*Moye*, *supra*, 47 Cal.4th at p. 555.) For example, "In *Breverman* there was affirmative evidence that the defendant panicked in the face of an attack on his car and home by a mob of angry men and had come out shooting, and continued shooting, even after the group had turned and ran. 'At one point in his police statement, defendant suggested that he acted in one continuous, *chaotic response* to the riotous events outside his door.' [Citation.]" (*Moye*, at p. 555.) Here, there was no comparable testimony because defendant testified he blacked out after once swinging a piece of glass at Wyatt. Defendant's testimony supported instruction upon self-defense and unreasonable self-defense, but "[t]here was insubstantial evidence . . . to establish that defendant 'actually, subjectively, kill[ed] under the heat of passion.'" (*Id*. at p. 554.)

Defendant's further contention that the wounds he inflicted upon Wyatt show that he "killed while acting in fear, anger, or rage" is unsupported by any authority and necessarily speculative, especially in light of defendant's testimony that he remembered

nothing. A killer might inflict numerous, even gruesome, wounds without acting under "the actual influence of a strong passion" induced by sufficient provocation. Absent evidence that "'the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment'" (*People v. Barton* (1995) 12 Cal.4th 186, 201), heat of passion is inapplicable. Given the state of the record, especially defendant's testimony that he was not conscious of what he was doing, the record did not support an inference that defendant's reason was obscured or disturbed by passion.

Similarly, defendant's speculative contention that he "was in such a state that he was unaware his own hand was being cut by the pieces of glass" fails to provide substantial evidence of the subjective element of heat of passion.

Accordingly, the trial court did not err by refusing to instruct upon heat of passion.

In any event, the absence of the instruction could not possibly have contributed to the verdict, and was thus harmless even under the more stringent standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824], because the record does not support a finding on heat of passion and, in light of the evidence, there is thus no reasonable possibility that the absence of the instruction contributed to the verdict. (*People v. Ochoa* (1998) 19 Cal.4th 353, 479.) As previously noted, the record was devoid of evidence that defendant subjectively harbored a strong passion and acted rashly or impulsively while under its influence. According to defendant himself, Wyatt's conduct frightened, but did not anger him. Thereafter, he was unconscious, which effectively precluded him from testifying he was acting under the influence of strong passion. If the jury rejected defendant's claim of unconsciousness, it was nonetheless left with no evidence that defendant subjectively acted under the influence of a strong passion. It is thus simply not reasonably possible that the refusal to instruct on heat of passion contributed to the verdict, especially in light of Totten's testimony that defendant approached the frail, weak, emaciated Wyatt and Totten himself in an "extremely aggressive" fashion, ranting

about a theft and yelling loudly, angrily, and aggressively at Wyatt; Totten's testimony that defendant threatened to "kick [Wyatt's] ass" when Wyatt asked defendant to go away; Totten's testimony that he feared there was about to be a physical confrontation at that time; defendant's contradictory testimony that he never saw Totten or any of the other witnesses and treated Wyatt kindly by sharing his drugs and alcohol with Wyatt and giving Wyatt money; defendant's admission that Wyatt was frail and weak; the medical examiner's testimony that Wyatt was six feet tall and weighed only 138 pounds; and the undisputed evidence that there was a time lapse between the attack with broken glass and the stomping that was at least as long as the time it took for Garstka and Likins to approach the parking lot, get into Likins's car, and drive away, and perhaps longer.

3. Failure to instruct sua sponte on *Garcia* theory of voluntary manslaughter

Relying upon a case decided after his trial and which has since been granted review (*People v. Bryant* (2011) 198 Cal.App.4th 134 (review granted Nov. 16, 2011, S196365) (*Bryant*)), defendant contends that the trial court had a duty to instruct sua sponte on voluntary manslaughter based upon the theory addressed in *People v. Garcia* (2008) 162 Cal.App.4th 18 (*Garcia*).

Even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1021.)

In *Garcia,* the victim and Garcia, who was holding a shotgun, were involved in a confrontation. The victim lunged at Garcia. Garcia feared the victim would take the shotgun, so he swung the butt of the gun at the victim to make him back off, but struck the victim in the face. This caused the victim to fall and hit his head on the sidewalk, which later caused the victim's death. (*People v. Garcia*, *supra*, 162 Cal.App.4th at pp. 23, 25.) Garcia was charged with second degree murder, and the trial court instructed the jury on voluntary manslaughter based upon heat of passion and unreasonable self-defense as a lesser included offense. A jury convicted Garcia of voluntary manslaughter.

On appeal, Garcia contended that the trial court erred by refusing to instruct on *involuntary* manslaughter on the theory that the killing "was committed without malice and without either an intent to kill or conscious disregard for human life." (*Id.* at p. 26.) The court in *Garcia* thus addressed whether an unintentional killing without implied malice during commission of an inherently dangerous felony (aggravated assault) could support an instruction for *involuntary* manslaughter where the merger doctrine applied to preclude application of the second degree felony-murder rule. (*Id.* at pp. 28–29.) The court ultimately rejected Garcia's instructional error claim, stating that "an unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter." (*Id.* at p. 31.)

Neither *Garcia* nor any other citable authority establishes the theory of voluntary manslaughter upon which defendant argues the trial court was required to instruct sua sponte. Well established principles limit voluntary manslaughter to an unlawful killing upon sudden quarrel or heat of passion or in an actual, but unreasonable, belief in the need to defend against imminent death or great bodily injury. (§ 192, subd. (a); *In re Christian S.* (1994) 7 Cal.4th 768, 783.) The trial court in *Garcia* so instructed, the jury convicted Garcia of voluntary manslaughter, apparently based upon one of the two recognized theories, and the appellate court did not purport to add a new category of offense constituting voluntary manslaughter. It instead made the statement upon which defendant relies in the course of its analysis rejecting Garcia's claim that his offense was involuntary manslaughter. Thus, the statement upon which defendant relies was dictum. *Bryant, supra,* 198 Cal.App.4th 134, upon which defendant relied, was decided the year after defendant's trial. Accordingly, even if the theory articulated in *Garcia* is ultimately recognized as a valid third basis for voluntary manslaughter, it cannot be said that at the time of defendant's trial it was a general principle of law upon which the trial court was required to instruct sua sponte. "Given the undeveloped state of the . . . rule, we cannot impose upon the instant trial court so formidable a duty as to conceive and concoct an

instruction embodying that rule. 'The duty of the trial court involves percipience—not omniscience.' [Citations.]" (*People v. Flannel* (1979) 25 Cal.3d 668, 683.)

In addition, even if the theory articulated in *Garcia* is ultimately recognized as a valid third basis for voluntary manslaughter, the evidence in this case would not warrant such an instruction because *Garcia* considered an unintentional killing without malice. "[M]alice may be [either] express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) Malice is implied "when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life." (*People v. Cook* (2006) 39 Cal.4th 566, 596.) Here, the evidence showed that defendant repeatedly slashed at Wyatt's face and neck, leaving Wyatt lying motionless and apparently unconscious in a pool of blood. Defendant then returned and stomped on Wyatt's head, forcing it against the pavement. Unless the jury adopted defendant's unconsciousness claim, which would lead to a verdict of involuntary manslaughter, there was no evidence from which a rational jury could have concluded that defendant stomped on Wyatt's head without harboring at least implied malice. Accordingly, the trial court would have had no sua sponte duty to instruct the jury on voluntary manslaughter pursuant to the dictum in *Garcia*.

4. Refusal of instruction regarding failure to collect and preserve blood sample

During his trial, defendant filed a motion to dismiss the charges due to the failure of the police to collect a sample of defendant's blood that could be tested for alcohol and drugs. Defendant's motion was based upon *Arizona v. Youngblood* (1988) 488 U.S. 51 [109 S.Ct. 333] (*Youngblood*) and *California v. Trombetta* (1984) 467 U.S. 479 [104 S.Ct. 2528] (*Trombetta*), which essentially require law enforcement agencies to preserve evidence that both possesses "exculpatory value that was apparent before the evidence was destroyed" and is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Trombetta*, at p. 489.) The

trial court denied the motion because it found no bad faith on the part of the police officers. Defendant subsequently requested the following instruction: "If you find that the state has allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the state's interest." The trial court refused to so instruct, stating that there was no bad faith and defendant had extensively cross-examined Thacker on this point and "called into question his abilities and his credibility. I think that is all that is required under existing law." Defendant contends the trial court's refusal to give the requested instruction was error and violated his right to due process.

Youngblood and *Trombetta* involved claims that due process was violated because the police failed to preserve evidence that had already been collected. In this case, defendant's blood was not sampled or tested. His complaint is the failure of the police to collect evidence, not their failure to preserve it. "Although . . . there might be cases in which the failure to collect or obtain evidence would justify sanctions against the prosecution at trial, [the Supreme Court has] continued to recognize that, as a general matter, due process does not require the police to collect particular items of evidence." (*People v. Frye* (1998) 18 Cal.4th 894, 943, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) California cases have uniformly rejected due process claims based upon a failure to collect evidence. (*Frye*, at p. 943 [no duty to collect additional bloodstains and other items at crime scene]; *People v. Daniels* (1991) 52 Cal.3d 815, 855 [no duty to perform gunshot residue test on witness]; *People v. Farmer* (1989) 47 Cal.3d 888, 911 [no duty to take "more and better photographs" of footprints]; *People v. Hogan* (1982) 31 Cal.3d 815, 851 [no duty to collect scrapings from victim's fingernails], disapproved on another ground in *People v. Cooper* (1991) 53 Cal.3d 771, 836; *People v. Velasco* (2011) 194 Cal.App.4th 1258, 1263 (*Velasco*) [no duty to confiscate clothing from prison inmate defendant]; *People v. Callen* (1987) 194 Cal.App.3d 558, 561 [no duty to determine identity of anonymous caller-informant]; *People v. Ventura* (1985) 174 Cal.App.3d 784, 794–795 (*Ventura*) [no duty to administer

intoxication tests to suspect arrested in fatal shooting]; *People v. Bradley* (1984) 159 Cal.App.3d 399, 405–406 [no duty to collect bloodstains].)

In *Velasco*, the court noted the fundamental distinction between a failure to preserve evidence and a failure to collect it in the first place: "It is axiomatic that the constitutional due process guaranty is a bulwark against improper state action. '[T]he core purpose of procedural due process [is] ensuring that a citizen's reasonable reliance is not frustrated by arbitrary government action.' [Citation.] If the state took no action, due process is not a consideration, because there is no 'loss of evidence attributable to the Government.' (*Youngblood*, *supra*, 488 U.S. at p. 57.)" (*Velasco*, *supra*, 194 Cal.App.4th at p. 1263.)

Defendant relies upon *Miller v. Vasquez* (9th Cir. 1989) 868 F.2d 1116, which extended *Trombetta* and *Youngblood* by holding that due process is violated by a bad faith failure to collect evidence. *Miller* is not binding on this court (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3), and contradicts the long line of California authorities cited herein.

Yet if we were to conclude that due process includes a duty to collect evidence, defendant's claim would fail because all that he can say about his blood sample is that it could have been tested and the results may have helped establish his mental state defense. He thus would have been required to show that the police acted in bad faith by failing to have his blood drawn (*Youngblood*, 488 U.S. at pp. 57–58; *People v. DePriest* (2007) 42 Cal.4th 1, 42).

"The presence or absence of bad faith by the police . . . must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." (*Youngblood*, *supra*, 488 U.S. at p. 57, fn. *.) The trial court repeatedly found that the officers had not acted in bad faith, and its finding is reviewed under the substantial evidence standard. (*Velasco*, *supra*, 194 Cal.App.4th at p. 1262.) Thacker testified at length about why he decided not to ask that medical personnel draw a sample of defendant's blood. The decision was principally based upon defendant's own

statement to the doctor at the jail dispensary that he had consumed only 12 ounces of alcohol in the form of beer and very little cocaine the previous night and information Thacker received from the responding officers about defendant's conduct, including his reaction when he saw the first officers on the scene, running swiftly from the officers without stumbling, discarding the cookies, hiding, and failing to surrender until a large number of offices surrounded him, which led Thacker to conclude that defendant was neither physically nor mentally impaired by alcohol or drugs. In addition, Pierce, with whom Thacker consulted about whether to draw a sample of defendant's blood, testified that his own observations of, and interactions with defendant did not indicate that defendant was under the influence. Pierce noted that defendant was cooperative, followed officers' directions, did not emit an odor of alcohol, and exhibited "rational and straightforward" behavior when Pierce assessed him to determine whether blood should be drawn. All of the police officers who participated in or witnessed the chase testified that defendant ran swiftly and never stumbled or fell. Officers Vasquez, Shaw, and Marx testified that defendant did not seem to be under the influence. Although Casper testified that defendant might have been under the influence, he also testified that defendant was not acting irrationally, slurring his speech, or falling. Marx testified that once someone mentioned a Taser, defendant surrendered and was thereafter cooperative. Marx and Casper further testified that when they took photographs of defendant at the police station, he complied with the officers' instructions and did not fall, yell, or talk to himself. All of this testimony provided substantial evidence in support of the trial court's finding that the police did not act in bad faith, and simultaneously established that defendant's blood sample did not possess "exculpatory value that was apparent" at the time. As stated in *Ventura, supra*, 174 Cal.App.3d at page 795, "The officers could not have foreseen that the defendant would raise an intoxication issue by way of defense."

We further note that defendant introduced evidence of his intoxication through his own testimony, Casper's testimony, Totten's testimony, Totten's statement to the police, Likins's statement to the defense investigator, and Likins's statements during the 911 call.

Given defendant's extensive cross-examination of Thacker and Pierce about the failure to obtain a sample of defendant's blood, and defendant's arguments to the jury, the jury was well aware of the reason defendant was unable to introduce blood test results in support of his unconsciousness defense.

Accordingly, we conclude that the trial court properly denied defendant's request for an instruction regarding the failure to collect evidence because the police did not violate due process. (*People v. Farnam* (2002) 28 Cal.4th 107, 167.)

5. Flight instruction

Over defendant's objection, the trial court instructed the jury on flight using a modified version of CALJIC No. 2.52, as follows: "The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. Whether or not evidence of flight shows a consciousness of guilt, and the significance to be attached to such a circumstance, are matters for your determination."

Defendant contends that instructing on flight was error violating due process because it permitted an unjustified inference about his mental state at the time of the offense and reduced the prosecution's burden of proof. He acknowledges that the California Supreme Court has repeatedly rejected similar claims.

A flight instruction is proper and required where the evidence shows that defendant departed the crime scene under circumstances suggesting his movement was motivated by a consciousness of guilt. (§ 1127c; *People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) "To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence." (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.)

The California Supreme Court has repeatedly upheld the use of CALJIC No. 2.52 against a variety of challenges, including arguments that it creates an unconstitutional

permissive inference or reduces the prosecution's burden of proof (*People v. Mendoza* (2000) 24 Cal.4th 130, 179–181; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223–1224) and that it permits the jury to draw an impermissible inference about the defendant's mental state during the commission of the charged offenses (*People v. Jurado* (2006) 38 Cal.4th 72, 125; *Jackson*, at p. 1224).

"The instruction did not assume that flight was established, but instead permitted the jury to make that factual determination and to decide what weight to accord it." (*People v. Carter* (2005) 36 Cal.4th 1114, 1182–1183; *People v. Abilez* (2007) 41 Cal.4th 472, 522.) Another instruction (CALJIC No. 17.31) directed the jury to disregard any instruction applying to facts that it determined did not exist. Accordingly, if the jury found that defendant's conduct in turning and running away from the responding officers, down an alley, across a street, and down another alley did not constitute flight immediately after the commission of a crime, it would simply disregard CALJIC No. 2.52 and would not infer consciousness of guilt. The final sentence of the instruction emphasized the jury's role in making these preliminary findings before inferring a consciousness of guilt. And if the jury found flight, the instruction provided defendant some protection by informing the jury it could not infer guilt from flight alone.

Accordingly, we conclude the trial court did not err by instructing upon flight.

6. Cumulative error

Defendant contends that the cumulative prejudicial effect of the various individual errors he has raised on appeal requires reversal of the judgment. His cumulative error claim has no greater merit than his individual assertions of error, which we have rejected.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.